No. 4000

In the United States

Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

D. PINCOLINI and J. PINCOLINI,
Plaintiffs in Error,

—vs—

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Defendant in Error

GEORGE SPRINGMEYER,
United States Attorney.

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Attorneys for Defendant in Error.

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ARGUMENT

The brief of plaintiffs in error is entirely devoid of citation of authorities. It is given up largely to statements of facts and evidence not appearing in the record, in an effort to supplement that record by matters not under the certificate of the trial judge. In this brief, we will endeavor to

refer definitely to the record in connection with the various assignments.

Furthermore, this brief will be confined to the assignments presented in the brief of plaintiffs in error, as under Rule 24 of this Court, the remaining assignments must be taken as waived by plaintiffs in error.

Assignment No. IX,

being alleged error in permitting counsel for the government to ask of defense witness Boyd, the question:

> "Q. Do you realize right now that if we had the Marshal put you under arrest on the charge of having possessed liquor on that day, there would be nothing for you to do but enter a plea of guilty? I am getting at his state of mind."

To which question the following objection was made, and by the Court overruled:

> "Objected to: he is not presumed to know the law of this case, or what would happen to him."

Plaintiffs in error do not argue that the objection, as stated, was not properly overruled by the trial court; in their brief, they now assume the objection to have been that the question tended to belittle and bring into disrepute their witness, and this operated to the prejudice of the plaintiffs in error.

The review in this court, however, is limited to the objection made in the trial court.

Bilboa vs. U. S. 287 Fed. 125.
Robinson & Co. vs. Belt, 187 U. S. 41, 47, L. Ed. 65.

Assignment No. XII,

being alleged error in permitting counsel for the government to ask of plaintiff in error J. Pincolini, on cross-examination, as a basis for impeachment, the question appearing on page 90-91 of Transcript.

The record on this alleged error is found at pages 90 to 93 of the Transcript; from the record it appears:

1. That the question was asked to lay foundation for impeachment.

2. That the witness answered the question negatively.

3. That his answer was given before objection was made.

4. That the only objection made was in effect that it was not proper cross-examination.

5. That there was no motion to strike either question or answer.

6. That the court first ruled adversely to plaintiffs in error, but after referring to the record of preceeding testimony, reversed that ruling and debarred the government from offering impeaching testimony.

The objection came too late after answer given by the witness.

16 C. J. 874

The ruling being favorable to the defendant, it

presents no grounds for reversal.

As to the prejudicial misconduct of counsel in asking the question, argued by plaintiffs in error in their brief, there is no such assignment, and no such exception; hence that part of counsel's brief is not in point.

Assignment No. XIII,

alleged error in denying motion for new trial.

The action of the trial court in denying a motion for a new trial is not reviewable.

Holder vs. U. S. 150 U. S. 92, 37 Law Ed. 1010.

It is true that this rule would seem to have this limitation, that if there is an abuse of discretion on the part of the trial court, his ruling on a motion for a new trial may be reviewed in the Federal Courts.

See Harley vs. U. S. 269 Fed. 384.

Here it is argued that there was such error in the court's instructions that a new trial should have been granted. The record discloses the following exception, and no other, taken to the court's instructions:

> "If it please the Court, we except to the portion of the Court's charge wherein the Court summarizes and states the testimony, upon the ground that the same invades the province of the jury, and that the same is beyond the power of the Court in charging the jury as to mere matters of law." (Transcript p. 96).

Thereafter the Court further charged the jury as follows:

> "I have discussed this testimony, because it is within the province of the Judge to do so if he believes it to be his duty. It may not be so in the State courts, but it is the province and right of a Federal Judge to discuss the testimony if he sees fit, and even to go so far as to give his opinion with reference to the case; provided he instructs the jury as I have done, that they must follow their own judgment, and that anything the Court says with reference to the facts and the evidence in the case, and the credibility of the witnesses, is a matter which can have no weight with them, except as it appeals to their judgment."

Under the rules of this court, the exception was not legally taken, being general and not specific. To the trial court it came only as a general exception, questioning the right of the trial judge, in his instructions, to comment upon the testimony in any manner. What becomes of such an exception in the face of the admission made by plaintiffs in error in their brief filed herein? We quote from that brief: "We concede that Federal Judges may comment on the evidence".

Had counsel, on the trial of this case, pointed out to the trial judge, by specific exception thereto, the particular parts of his instructions now commented upon by them, and had the trial court thereafter denied their motion for a new trial, they might now be in a position to raise the question as to whether in that ruling the trial court had been guilty of an abuse of discretion.

Finally, assuming that the question of the cor-

rectness of the instructions is properly here for review, an examination of the language used by the trial court will reveal that he repeatedly warned the jury against accepting what he might say about the evidence, except as it might appeal to their judgment. The Court has not at all invaded the province of the jury. The law in the Federal Court is too well settled to require citation of authority; it is merely a question of examining the instruction itself.

For the reasons aforesaid, it is respectfully submitted the judgment should be affirmed.

Dated at Reno, Nevada, this 1st day of October, 1923.

Respectfully submitted,

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